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No. 211.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

PHINEAS PAM-TO-PEE AND OTHERS, appellants,
v.
THE UNITED STATES.
} No. 211.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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This is an appeal by the claimants from a judgment of the Court of Claims rendered on May 20, 1901, dismissing the claimant's petition.

In pursuance of the policy of the United States inaugurated during the first half of the last century, having as its object the removal of the Indians from lands east of the Mississippi River to those west of the Mississippi, the United States incurred certain obligations under the treaty of September 26, 1833 (7 Stat. at L., 431), to the United Nation of Chippewa, Ottawa, and Pottawatomie Indians, in the nature of agreements to pay said Indians certain annuities from time to time.

In a supplement to that treaty entered into the next day, September 27, 1833 (7 Stat. at L., 442), it was agreed that a certain portion of said Indians might

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remain in the Territory of Michigan "on account of their religious creed," and that the Indians so remaining should be entitled to receive their just proportion of annuities that should become due under the terms of the said treaty.

Various payments were made to the Indians on account of these annuities, part of the payments being made to those who had emigrated and part being made to those who remained in Michigan under the supplemental treaty above referred to. And finally, in 1866, the United States undertook to settle up the whole matter by a certain payment, the portion going to the said Indians who remained in Michigan being $39,000. (27 Court of Claims, 406.)

Congress, however, in 1890 passed an act (26 Stat. L., 24) giving the Court of Claims jurisdiction to try all questions arising out of treaty stipulations between the United States and the Pottawatomie Indians of Michigan and Indiana, irrespective of said settlement.

Under the provisions of said act two petitions were filed in the Court of Claims, one on April 14, 1890, No. 16743, in behalf of certain Pottawatomie Indians by John Critcher, who described himself as their authorized attorney; the other on November 5, 1890, No. 16842, in behalf of Phineas Pam To Pee and 1371 other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney. (27 Court of Claims, 410.)

These two cases were consolidated on January 8, 1891 (finding 2), and after extended hearings the

Court of Claims rendered judgment in favor of said Indians for the sum of $104,626, which judgment was affirmed by this court (Appendix, p. 10).

Neither the Court of Claims nor this court attempted to enumerate the particular Indians who were entitled to this money. The Court of Claims refused to enter upon such an inquiry, and said (27 Court of Claims R., p. 414):

> Congress have recognized by the very title of the act a claimant designated as the "Pottawatomie Indians of Michigan and Indiana," and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the Government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians.

After affirming the judgment of the Court of Claims in regard to the amount due to the Indians in Michigan, whoever they might be, this court said (148 U. S., p. 703):

> How the moneys so awarded should be distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition.

After quoting the language of the court below, this court further says:

> On the other hand, it is contended, with great show of reason, by the petitioners who are

represented in case No. 1125 (16842 in the court below), that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently.

It is to be observed that the court below found as a fact (see finding 10) that the average proportion between the Indians who removed west and those who remained was as 2,812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

The petitioners, however, number 1,371 in case No. 1125, but the number represented in No. 1133 (16473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1125 that only 91 Indians are actually represented in case No. 1133, and that the other 200 Indians are among those represented in case 1125.

But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians entitled to distribution are represented by the respective attorneys or agents.

Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be

dealt with by the authorities of the Government when they come to distribute the fund.

As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the Government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the Government in paying out the fund. (*United States* v. "*Old Settlers*," ante, p. 509.)

Consequently, the distribution of the $104,000 was left to the Department of the Interior, under such light as it could get from the opinions of the Court of Claims and the Supreme Court. Congress appropriated a sum sufficient to pay the judgment and made a further appropriation of $1,000 to defray the expenses of taking a census of the Indians entitled to participate. (29 Stat. L., 894.)

It appears from the findings of fact made by the Court of Claims in the original suit that certain payments of amounts due from annuities and other sources were made to the class of Indians who were entitled to remain in Michigan under the treaty of September 27, 1833. These payments extended from 1843 to 1866, and the pay rolls on which the payments were made were set forth in finding 7 (27 C. Cls. R., 405, 406). The amounts thus paid were due to the same class of Indians that was entitled to the amount of the judgment rendered by the Court of Claims. In fact, that

court treated the amounts paid under those pay rolls from 1843 to 1866 as part payments upon the amounts claimed to be due in that suit, and deducted the amounts so paid from the total amounts due to said class of Indians. It is therefore evident that the United States supposed, at the time it made those payments from 1843 to 1866, that it had located the individual Indians who were entitled to participate in those annuities, and it must follow that they are the same ones who the United States at that time supposed were entitled to everything that might be due to those who remained in Michigan under said treaty.

When the Interior Department came to distribute the money carried by the judgment of this court, it appointed Mr. John Caduan as an inspector, and instructed him to make a census of those who were entitled to participate in said judgment, and to confine such census to those Indians who appeared on the pay roll of 1866 and the descendants of Indians on such roll who had died since.

It seems that few, if any, of the Indians represented on the pay roll of 1866 were included in the petition filed by Mr. Shipman, and thereupon Mr. Shipman, on July 27, 1895, protested to the Secretary of the Interior against such a method of distribution, stating that all Indians and descendants of deceased Indians who appeared on any of the said pay rolls from 1843 to 1866 should be included in said enumeration. (Appendix, p. 11.) It appears from this protest that Mr. Shipman had had various interviews with Mr. Cadman and was familiar with what was being done by the Department.

The Commissioner, on January 9, 1896, submitted to the Secretary an argument to the effect that it would be impracticable to include any Indians who did not appear on some of the pay rolls from 1843 to 1866, and recommended that the Indians who did appear on such pay rolls, or any of them, should be included. The Secretary agreed to this and so notified the Commissioner on January 10, 1896 (p. 14). In the meantime Mr. Cadman had completed his census, which showed all the Indians and the descendants of Indians who were on the pay roll of 1866. Thereafter the Department instructed a special Indian agent, Mr. Marcus B. Shelby, on February 5, 1896, to proceed to Michigan, Indiana, and Illinois, to examine and report upon the claims of various Indians, which had been filed in the Department. He was also informed that any Indians who could show that they or their ancestors were upon any of the pay rolls from 1843 to 1866 should be added to the enumeration already made by Mr. Cadman. He was also instructed to post notices of his coming and give the Indians timely advice of the object of his visit. He was also furnished a copy of the Cadman census (Appendix, p. 14). Mr. Shelby made his investigation and reported March 14, 1896 (id., p. 15). It appears from this report that Mr. Shelby posted notices of his visit and its object, and also advertised the same in the local newspapers. It also appears that, in addition to the claims of those Indians whose names had been given to him by the Department as claimants, he

heard the applications for enrollment of a number of other Indians who, in his judgment, had no standing, as they could not show their descent from anyone on any of the pay rolls. It also appears that a long list of Indians was forwarded to the Indian office by D. K. Foster, of Bradley, Mich., which was afterwards withdrawn, as it seemed impossible to prove that these Indians were the descendants of any of those on the pay rolls.

The result of Mr. Shelby's investigation was the addition of two names to the census made by Mr. Cadman. Thereafter the Department distributed the whole sum of $104,000 to the Indians on Mr. Cadman's census, with the few additions made by Mr. Shelby. (Finding III, p. 8.)

The petition in this case is filed on behalf of Phineas Pam-to-pee and a large number of other Indians, stating that they were entitled to be enrolled and receive a proportionate share of said judgment, but that the same was not paid them. It is claimed that there are 272 such Indians, and that they are entitled to the aggregate sum of $78,329.25, and judgment for that amount is demanded.

The theory on which the claimants' case proceeds is that the distribution made by the Interior Department was confined to the Indians and descendants of Indians who appear on the pay roll of 1866; that the Indians and descendants of Indians who appeared on previous pay rolls, but not on that of 1866, were denied enrollment.

It further appears that the Indians represented in this case are descended from Indians whose names were enrolled on the aforesaid pay rolls in 1843, 1844, and 1866. As a matter of fact but few, if any, of them were on the pay roll of 1866, but they were mostly on the pay rolls of 1843 and 1844. (Finding X, Record, p. 10.)

It does not appear from the findings in this case to what individuals the one hundred and four odd thousand dollars was actually distributed by the Interior Department, nor how many Indians were allowed to participate in that distribution. The whole fund was $104,626, and it is not disputed that it was all paid out, nor is it disputed that the Indians to whom it was paid were of the class included in the judgment of this court and of the Court of Claims, and therefore entitled to receive some part of said fund. Neither does it appear that these Indians here represented and the ones paid are all the Indians whose ancestors appeared on some one of said pay rolls.

It therefore appears that there is not enough information in this record to indicate how large a part of said fund should be distributed to the 272 Indians who are represented in this proceeding, provided the court should be of the opinion that those Indians are entitled to receive some portion at this late date.

There is another consideration that leads to the same conclusion. These Indians lost their tribal relation at the time of the making of this treaty. When they so lost their tribal relation, they came under the operation

of the laws of the States in which they lived and were emancipated from any tribal control.

Eastern Band of Cherokees v. *The United States*, 117 U. S., 288;
United States v. *Boyd*, 68 Fed. Rep., 579;
Lowry v. *Weaver*, Fed. Cas. 8584.

In the Cherokee case above cited the situation was very similar to that of these Michigan Indians, and it was there said:

> The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves had been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court of Claims in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a nation in whole or in part. (20 C. Cls. R.)

All these annuities and payments that were adjudged to be due to these Indians became due after such tribal relations had ceased. Consequently they were

due at certain specific times to certain individual Indians.

It appears from the record in this case that the judgment was distributed not per stirpes but per capita. (Record, p. 9.) That is to say, all the Indians discovered were allowed to participate equally in the fund, irrespective of the generation to which they belonged. The son of an Indian who appeared on one of the pay rolls was allowed only the same amount which each of, say, five grandchildren of an Indian on one of the pay rolls was allowed. They should have taken by representation. The aggregate of the five shares of the five grandchildren mentioned should have equaled the share of the son of the original payee. The consequence is that the whole judgment was distributed on a wrong basis. The payments became due to individuals at various times. The record discloses no reason why the estate of the individual to whom such payment was due is not entitled to the whole of such payment.

If anyone on the pay rolls at the time the annuities became due died without heirs who could inherit, there is no reason why his share should not escheat. It is perfectly evident that a mere enumeration of the Indians, and an equal division among them, does not fulfill the requirements of the situation.

The result of these considerations is that the claimants here have not shown enough facts to enable this court to enter judgment for a specific amount, even if they are entitled to the further distribution. They

must show not merely the fact that their ancestors were on these pay rolls, but they must show the degree of their relationship, and that they are the legal heirs of such ancestor. They must further show the same things in regard to all the parties who did actually get the money, for it is impossible to tell without such information what share ought to have gone to them.

The United States may have been justified in distributing these annuities per capita at the time they actually became due, because such may have been the reasonable interpretation of the contract. But when the annuities did become due, the parties entitled to them took a vested right therein which could not be divested by the retention of the funds in the possession of the United States for fifty years. The moment a certain individual became entitled to a certain portion of an annuity which had accrued, he evidently had a right to it which could not be modified by his decease or the fact that his neighbor had a larger family.

The result of the whole discussion is that if the matter is to be opened an accounting *de novo* will have to be taken in which not only the Indians now claiming but those who actually received the amount of the judgment should be included. It is possible that many of them did not receive what they were justly entitled to, and, in fact, such must be the case when the manner of distribution is considered.

It follows from this that the case is not in such a condition that any final judgment can be rendered here, and the only questions become (1) whether or

not it appears from this record that these 272 Indians are among those in whose favor the said judgment was rendered, and (2) if so, whether or not they are barred from their right to recover their proportion by the distribution which was made by the Interior Department or by their conduct in relation to such distribution.

The first question to be considered is what the record shows as to who the Indians are who should have participated in this judgment.

There is some obscurity in the findings of the court below in regard to this point, but it is submitted that the effect of those findings is that the only class entitled to participate in the distribution are those whose names appeared on the pay roll of 1866.

THE PAY ROLL OF 1866 IS THE BEST EVIDENCE OF THOSE ENTITLED TO DISTRIBUTION.

Before considering whether or not distribution was made upon the basis of the pay roll of 1866 alone, the court should consider whether or not the findings of fact and the opinions of this court and the Court of Claims in the case in which the judgment was rendered did not decide that the pay roll of 1866 was the most reliable evidence as to what Indians were entitled to participate in the judgment. It is evident from the opinion of this court and that of the Court of Claims that both tribunals were impressed with the difficulty of obtaining any evidence at the present date to indicate what Indians were entitled to receive this money. With one accord they left the question to the Indian Office upon the indications contained in the old pay rolls.

In arriving at the amount which was due to the Indians who remained in Michigan, the Court of Claims was forced to and did rely upon these pay rolls as the only reliable evidence to indicate how large a proportion of the Indians remained in Michigan who were entitled to the annuities. It relied upon these pay rolls as showing the average number of Indians who went West and the average number of those who stayed in Michigan under said treaty, and on the basis of such average numbers the proportion of the money which should be paid the Michigan Indians was determined at $104,000. In adopting this method of arriving at the respective numbers of Indians who emigrated and those who did not, the Court of Claims says in regard to these pay rolls as evidence:

> The Government officers, commencing with 1843, in the distribution of the annuity of $18,000, after an examination and inquiry satisfactory to themselves, and presumably to do justice between the Indians remaining and those emigrating, ascertained and determined the number as coming within the article giving the right to stay at 253, and for a period of twenty-three years the defendants distributed the annuity of $1,587.50 and the $39,000 upon a basis ranging in numbers from 204 to 260, the first being in 1843 at 253, and the last being in 1866 at 230. During all of that time the United States, by its officers and agents, proceeded in the belief that those numbers represented the class which was to participate in the annuity fund without being compelled to re-

> move beyond the Mississippi with the main body of the nation, and the claim now made in 16842 for more than 1,400 first assumed definite form when the statute of our jurisdiction was passed. (27 C. Cls. R., 417.)

Further, the court refers to the tabulation of these pay rolls and certain earlier ones in the following language:

> And it seems to have been recognized in such a way as that it becomes to the court the most reliable data on which to predicate a finding of the relative proportion of those emigrating and those remaining (p. 418).

It is evident from this that the Court of Claims took the position that these pay rolls are the best evidence that can be produced on any question which they purport to decide.

The question which that court was deciding upon the strength of these pay rolls as evidence was the number of Indians who remained in Michigan as compared with those who went West; but the same reasoning applies to anything else which is indicated by these rolls. It is consequently submitted that the pay roll of 1866 is the best evidence of who the Indians at that date were who had appeared on the earlier pay rolls and who were the descendants of those who had so appeared and had died in the meantime. The first roll of 1843 indicated who were entitled at that date. The second pay roll of 1844 should indicate which ones were still alive and what descendants of those who had died during the year were entitled to

participate, and so on down to 1866. The result must be that the pay roll of 1866 embodied the judgment of the contemporary Indian officers upon the matter of the original claimants and the descendants of those who had died. No reason can be suggested why any Indian who was on one pay roll should be dropped from the next, unless there was some good reason why he was not entitled to participate in these moneys; nor can it be suggested why the descendants of an Indian who had died should not have been added to the subsequent pay rolls upon the decease of their ancestor.

It is further probable that some who appeared on the first pay rolls were dropped for good reason. The Indians entitled to remain in Michigan were those who entertained a certain religious belief now undisclosed. It appears that the Indians were very loath to leave Michigan and many insisted on staying who had no right to stay under the treaty. It is said in finding 11, 27 Court of Claims, 408:

> XI. Many of the Indians residing in the State of Michigan, on said reservations, were opposed to emigrating west with the main tribe and refused to go. They were dissatisfied with the treaty which made it their duty to go, and the result was the Government had to resort to force to compel their departure. In the struggle incident to the enforcement of the treaty many Indians refused to go. Those Indians did not come within the supplemental clause of the treaty of September 27, 1827, as construed by the agents of the Government. In evading the officers and agents of the Government they

scattered into different parts of the State, many of them going to the northern portion. It is impossible to determine with substantial accuracy the number so remaining, but they outnumbered the Indians who remained by consent of the agents of the Government as coming within the exception as to removal. The two classes numbered 1,100.

When it came to distributing the earlier annuities, it is doubtless true that some of this larger class of Indians, who had no right to stay, got their names on the rolls and were afterwards gradually weeded out by the Indian agents as they learned of the errors.

Furthermore, the money distributed was divided among the various families of Indians, according to the number in such families. Consequently, the children of each Indian were represented on each pay roll for the purpose of determining the amount which should go to that family. How they could get dropped from succeeding pay rolls does not appear.

Furthermore, there was a period of twenty-three years, from 1843 to 1866, during which any Indians who were entitled to participate in these moneys could have gotten on the rolls, and doubtless those who were entitled did so.

The pay roll of 1866 was the one on which the largest amount of money ever distributed to the Michigan Indians was divided, and it was supposed at that time that this payment was a payment in full for all moneys due said Indians. It may consequently

be supposed that this roll was prepared with more accuracy than any of the previous ones.

For all the reasons above given, it is submitted that the roll of 1866 is the most accurate evidence of who were the Indians at that time who had rightfully appeared on previous rolls and who were the descendants of those who had at any time so appeared.

If the Court of Claims held to the same reasoning it adopted in arriving at the total amount due, it must have come to this conclusion.

If it was incorrect to distribute this judgment to those only who appeared on the roll of 1866 and their descendants, it was incorrect to distribute the payment of $39,000 to such persons in 1866.

This is equivalent to saying that the Court of Claims can now better determine from oral evidence who such Indians were than could the officers of the Government at that time. This is contrary to the whole spirit of the decision of this court and the decision of the Court of Claims.

Looking at the language used by that court, it seems that the court intended the last pay roll to govern. The only statement of what Indians were entitled to receive the judgment is contained in finding XIV, and is as follows:

> XIV. The Indians mentioned in finding VIII, described as "those remaining East and coming within the supplemental articles to the treaty of September 26, 1833, are those parts of the Pokagan and Nottawasipi bands to whom the payment mentioned in the said letter of Hon.

E. B. French was made, as shown in finding VII." (27 C. Cls. R., 409.)

The letter of Mr. French referred to contains a table made up from the rolls from 1843 to 1866, inclusive, and then makes special reference to the last payment of $39,000, setting forth the language of the receipt which the Indians gave when that payment was made to them.

The language of Finding XIV is not that this judgment belongs to those to whom "payments" were made as mentioned in the letter of Mr. French, but to those to whom "the payment" was made as mentioned in said letter. The only payment which Mr. French particularly discussed was this payment made in 1866 of $39,000 under the pay roll of that date.

It is natural that the court should have adopted this evidence, and it is clear that it did so adopt it. This is further evident from the opinion of the court.

It seems that the Indians who actually got the money carried by this judgment were those represented in Mr. Critcher's petition, No. 16743. The court says:

> There is no dispute as to the amount paid the claimants since 1836. Besides the amount of $39,000 under said resolution, the claimants in 16743 have received the further sum of $36,162.50, making in the aggregate the sum of $75,162.50 (p. 416).

It is evident from this statement that the Court of Claims thought that the Indians represented on the pay roll of 1866 who received the $39,000 represented

the same Indians who had appeared on the previous pay rolls back to 1843 and who had received during that time the sum of $36,162.50. In other words, this court was convinced that the last pay roll contained the best evidence as to who did actually represent the Indians on the earlier pay rolls.

It is therefore submitted that it has already been decided in a case in which the present claimants were parties, and by which they must be bound, that the pay roll of 1866 accurately represented the Indians who were entitled at that time to receive all annuities and other sums that were due to that portion of the Pottawatomie tribe which had the right to remain in Michigan under the treaty of September 27, 1833. If this be so the Interior Department was perfectly right, although it did distribute the judgment according to the Cadman census, which represented only those who appeared on the pay roll of 1866. If the court is convinced that this position is correct, then, inasmuch as all or a large part of the claimants in this suit are only on the rolls of 1843 and 1844 and not on the roll of 1866, it must follow that most of them are in no event entitled to a share of the fund.

THE UNITED STATES WAS DISCHARGED BY THE DISTRIBUTION MADE.

It is evident from the statement already made that the money was distributed as best it could be to those who were represented, not only on the pay roll of 1866, but on all the pay rolls back to 1843.

After the Cadman census, which was confined to the pay roll of 1866, was made, Mr. Shelby was sent west

under instructions to add to the roll any Indians who were represented on the older pay rolls and who had been omitted on the Cadman census. Mr. Shelby heard the claims of a large number of Indians and placed upon the roll all those who showed that they or their ancestors were on any of said rolls. It further appears that he had advertised his trip extensively and had given everyone an opportunity to prove his claim.

Under these circumstances, if some were omitted, can they now recover? An answer to this question must be sought in the nature of the original proceeding in which the decree was entered and in that decree itself.

If the Pottawatomie Indians of Michigan had retained their tribal relations, there would have been no difficulty in the matter. They would have sued as a tribe and the money would have been turned over to them as a tribe, and the tribal officers would have been responsible for its proper distribution. As it was, all tribal relations of those who remained in Michigan ceased upon the making of the treaty of September 27, 1833. That portion of the tribe which went west maintained its organization, but those who remained in Michigan did not do so. The Court of Claims said:

> In ceasing to be a part of the united nation it did not retain any part of the political or corporate power of the tribe; that was undivided and still inherent in the body which emigrated beyond the Mississippi pursuant to the terms and requirements of the treaty. The portion remaining may have acquired a right to share

> in the annuities, but the corporate power of the tribe remained intact and incident to the larger body which emigrated. (27 C. Cls. R., 412.)

The situation, therefore, when Congress passed this jurisdictional act disclosed a large number of individuals having similar interests in a common fund in the possession of the United States. The right of each individual against the United States, the trustee of the fund, was based upon the same facts. The amount of the fund and the portion to which each individual was entitled depended, of course, upon the number of such individuals.

The history of the distribution of this fund by the agents of the Interior Department; the fact that a new suit is brought by several hundred who, it is claimed, were omitted in the distribution, although entitled, are sufficient evidence that it is no small labor to indicate by name the Indians scattered throughout Michigan who were, as a matter of fact, entitled to participate in this judgment.

The Court of Claims said that any Pottawatomie Indian of Michigan had a right to bring suit, and that the petitioners in such a suit were "subject only to the qualification or limitation of being Pottawatomie Indians of Michigan and Indiana." (27 C. Cls. R., 413.)

As an ordinary proposition every suit in equity must join as parties all who have an interest in the matters which are to be adjudicated in such suit and whose interests will be affected by a proper decree therein. If this rule were inflexible, it would result in more injustice than the injustice of adjudicating the rights of some

in a proceeding to which they are not parties. The result has been that equity has recognized certain well-defined exceptions to the general principle above referred to, and has allowed rights to be adjudicated when all the parties affected have not been before the court. The basis of this exception is, first, the prevention of a multiplicity of suits, and second, the impossibility of always joining every one affected when such persons are exceedingly numerous or can not be ascertained. It is perfectly evident in this case that if it had been necessary to make all the Indians who were entitled to participate in this fund parties either plaintiff or defendant no suit could have been brought. As soon as a suit was brought it would be subject to abatement upon the discovery of another Indian. Consequently it was essentially one of those cases in which equity allows a suit to be brought by one of a class to adjudicate not only his own rights but the rights of all similarly situated. Frequent illustrations of this procedure are met with, as cases in which one creditor sues in his own behalf and in the behalf of all similarly situated to procure his debt out of a specific sum: the case of a legatee who sues in his own behalf and in the behalf of others similarly situated; or one of the next of kin, or in fact one of any extensive class of persons who are unknown, without the jurisdiction, or inaccessible for any other reason. The precedents and the reasons for such a proceeding are numerous.

After stating that, as an ordinary proposition, everyone interested in the subject-matter of a suit in equity

must be made a party to that suit, Justice Story says there are certain exceptions to the rule (Equity Pleadings, 9th edition, sec. 207 a):

> So, wherever a great practical inconvenience would arise from a strict application of the general rule, there the court has power to relax it in order to prevent that which is laid down for the purposes of justice from working the contrary: as, for example, where there is a small property to be divided among a large number of *cestuis que trust*, who are foreigners resident abroad. The like exception would seem to apply where the *cestuis que trust* (or beneficiaries) are very numerous or the description of them is so general that it is difficult or impracticable to ascertain, in the first instance, who are all the persons included therein, or many are unknown or are resident abroad.

He further says (sec. 105):

> Such a bill is maintainable not only upon the ground of the supposed uncertainty of the persons answering the description, but also where they may be known, and yet they are exceedingly numerous.

In the case of *West* v. *Randall* (Fed. Cas., No. 17424) Mr. Justice Story gave a large number of instances in which such a bill would be proper, and said:

> The principle upon which all these classes of cases stand is that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making

other persons parties; and the latter it deems the least evil, as it can consider other persons as quasi parties to the record, at least for the purpose of taking the benefit of the decree and of entitling themselves to other equitable relief if their rights are jeoparded. Of course, the principle always supposes that the decree can, as between the parties before the court, be fitly made without substantial injury to third persons. If it be otherwise the court will withhold its interposition.

Again, speaking for the Supreme Court of the United States, in *Mandeville* v. *Griggs* (2 Pet., 482), Mr. Justice Story said:

> It is well known that there are cases in which a court of equity dispenses with such a proceeding when the parties are very numerous or unknown and the adoption of the rule would essentially impede if not defeat the purposes of justice.

These principles are again approved by the Supreme Court in the case of *Smith* v. *Swormstedt* (16 How., 288). Mr. Justice Nelson said:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the

> decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

In the case in which this judgment was rendered in favor of these Indians all the considerations that make such a procedure desirable were present. The parties were exceedingly numerous and exceedingly uncertain. Consequently the suit was properly brought by certain individuals on behalf of themselves and others similarly situated under the above decisions.

That the suit which was brought in this matter was of such a character there can be no doubt.

In the petition filed by Mr. Shipman it was specifically stated that it was for the benefit of all Indians entitled. (148 U. S., 695.)

In fact, unless the suit was for the benefit of all, the court could not have entertained jurisdiction. All the parties interested either must be before the court or the suit must be for their benefit.

> Story's Equity Pleadings, secs. 98–99.
> *Leigh* v. *Thomas*, 2 Ves., 312.
> *Brown* v. *Ricketts*, 3 Johns. Ch., 553.

It is therefore evident that the suit must have been dismissed if it had not been intended to be for the benefit of all concerned.

In fact, it does not seem to be disputed by the

claimants in this suit that the original suit was brought for the benefit of all interested.

In such suits anyone who has an interest in the matter in controversy can come in and claim that interest, although he is not made a party to the bill.

> Story's Equity Pleadings, sec. 99.
> *West* v. *Randall*, Fed. Cas., 17424.
> *Waite* v. *Temple*, 1 Sim. & St., 319.
> *Gifford* v. *Hort*, 1 Sch. & Ler., 409.

In the Federal case above cited it was said:

> Yet in these cases, so solicitous is the court to obtain substantial justice that it will permit the other parties to come in under the decree and take the benefit of it or to show it to be erroneous, and award a rehearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice. (Coop. Eq. Pl., 39; 2 Madd., 144, 145; *Cockburn* v. *Thompson*, 16 Ves., 321.)

It is therefore evident that any one of the claimants in the present suit had a right to enter as a claimant in the suit in which the judgment was rendered or to press his claim before the Indian Office had distributed the judgment.

The origin of this procedure and the reasons which led to its allowance have been thus fully gone into for the reason that an understanding of these matters is essential to a determination of what the proper method of closing up such a suit is.

Such a procedure must lead to certain results without which it would be hazardous or impossible. Is it

possible that a court of equity at the instance of one of a class could proceed in such a suit to adjudicate the entire amount of the fund to which such class was entitled, and at the same time some representative of that class, who was not made a party to the proceeding, could successfully maintain another and a later suit to readjudicate the amount of the fund due to such class? Such a conclusion would negative the right to bring any such proceeding, for it could never be done with safety.

Again, can it be possible, when such a suit has been brought and the entire fund that belongs to the class has been ascertained and it has been adjudged that all of that class have a right to participate, that the fund can not be distributed until each one who actually is entitled to a share has been brought before the court? If such a conclusion were possible, it also would negative the existence of any such procedure, for the very basis of the procedure is that the parties are so numerous or so undefined that they can not be found in the first instance. If it were necessary to actually find them before a distribution could be made, the whole proceeding would be nugatory. It must then be concluded that a distribution can be made even though some entitled to share be left out of such distribution.

Is it then possible that one who was left out can again bring a suit and recover from the defendant, who held the fund as trustee, his distributive share which has already been given to those who did come into court and participate? But one answer to these

questions is possible. If the claimants' case can succeed, the obvious and only possible answers to these questions must be incorrect.

If it had been necessary to find all these Indians, the suit could not have been brought in which the judgment was recovered. If a distribution could not have been had before all such Indians were found the money would still be in the Treasury. If the theory of the claimants is correct, the United States, as trustee for these Indians, was not discharged by the former judgment and distribution and must pay again upward of $78,000.

The claimants' attorney has found 272 Indians who, he says, should have participated in this distribution, and therefore proposes that this $78,000 be distributed to the 272 individuals whom he has found. What is to prevent him or some one else from finding 272 more next year and getting another $78,000 under this judgment?

All these propositions show the absurdity of any such contention. If a suit can be brought by one of a class for the benefit of a whole class, the judgment in that suit must bind the whole class. If those entitled to that judgment can come in and prove up their claims, it must be that those who do not come in and prove their claims are likewise bound by the distribution.

It has been so held.

First. A decree in such a suit, fixing the amount of the fund to which a class is entitled, is binding on the

whole class although some of them may not have been made parties to the suit and may not have taken advantage of the decree.

Story's Equity Pleadings, sec. 99.
Kenyon v. *Worthington*, 2 Dick., 668.

In the above case one John Cash brought a bill in equity against Mrs. Kenyon, executrix, for the purpose of establishing his debt against the estate which she was administering, and said bill was brought not only in his own favor but in the favor of all other creditors. The will was established, and it was ordered that an account be taken of the assets of the estate and an account of the debts due the various creditors, that advertisements for creditors be had and necessary directions for the payment of debts were given. Thereafterwards John Worthington sued the executors for a debt which he alleged against the testator, notwithstanding the decree above referred to. Thereupon the executrix Kenyon brought the present suit, asking for an injunction against Worthington's suit. It will be noticed that the suit in which the decree referred to was entered was in favor of all creditors, and it does not appear whether Worthington was a party to that bill by name or not.

Lord Eldon granted the injunction, saying:

> Having decreed an account of what is due to all creditors, and having decreed an account of assets and administration of them in payment, will this court suffer its decree to be rendered nugatory by altering the course of administration? Certainly not. It will surely protect the

> executor or administrator in obeying its decrees. The creditors will have justice here and, therefore, let the injunction extend to stay trial.

This is but an instance in which a court has held one not a party but who was represented by a party of the same class to be bound by the decree.

It does not seem to be contended in the present suit that the matter of how much money was due the Pottawatomie Indians of Michigan, as a whole, should be reopened, but it is important in this connection to understand that the decree in that suit is binding upon all parties in interest, in the first place, in regard to the gross amount due such class.

Second. When a distribution is made under a decree of court in such a suit, those who do not come in and claim their shares and prove their right thereto before such distribution, are bound thereby and can not afterwards maintain a suit for the share which they should have received.

In commenting upon the effect of such a decree of distribution, Mr. Justice Story said (Equity Pleadings, sec. 94):

> For in every case in which a decree is made, where the parties, being numerous, are on that account dispensed with and all of them are not before the court, their interests may be incidentally and indirectly affected; as, for example, if in a bill of this sort an account is taken, and there is a decree giving a certain portion of a fund to the parties before the court, the parties not before the court will be bound by that account and decree, and the court will protect

> the defendant acting under the decree and obeying it from future litigation on the points so decided, for otherwise the defendant would really be deprived of all protection.

Further, in commenting upon such a suit brought by one creditor, the same writer said (sec. 99):

> The other creditors may come in under the decree and prove their debts before the master to whom the cause is referred and obtain satisfaction of their demands equally with the plaintiffs in the suit, and under such circumstances they are treated as parties to the suit. If, however, they decline so to come in before the master they will be excluded from the benefit of the decree; and yet they will from necessity be considered as bound by the acts done under the authority of the court.

Further, in speaking of all such suits, he said (sec. 106):

> But, although the court will, in cases of this sort, entertain jurisdiction by creditors, legatees, and distributees on behalf of themselves and all others, and will exonerate the executor or administrator, or other trustee, from all liability in respect to payments of the assets made pursuant to its decree, yet it is not to be understood that such a decree absolutely binds the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor, or administrator, or trustee, yet they have a right to assert their claim

> to a share in the property against the creditors, legatees, or distributees who have received it.

In *Farrell* v. *Smith* (2 Ball & B, 337) the executor proved the will, and certain disputes arising as to who were legatees under it, he filed his bill against those claiming to be legatees, so far as he knew them, and a decree was entered ordering a reference to a master to ascertain upon advertisement what persons were in existence who answered the description of the legatees in the will, they being therein described as a class. Upon such proceeding the whole legacy was distributed. Some years afterwards the plaintiff brought suit against the executor, claiming to be a legatee who had received no payment, and asking that the executor be ordered to pay over a distributive share. The court, however, said:

> It appears to me that nothing could possibly be more injurious to the administration of justice than to grant the relief sought in this case by the plaintiff: indeed, I have never heard of a bill like the present, and I am sure no precedent can be produced in support of it: for what executor would be safe if he were liable to answer for a distribution of assets made under a decree of the court. The bill should have been to reverse the decrees in 1802 and 1803 as erroneous, for it has been brought, not in fact to set aside what the executor has done, but what the court has done in the usual course of proceeding, acting in the best possible manner.

In *David* v. *Frowd* (1 Myl. & K., 200), it appeared that David Williams died intestate, leaving an estate of

about £4,000. David Frowd was appointed administrator. One Ella Church, claiming as next of kin, filed a bill against the administrator for an account and an inquiry as to who were the next of kin, stating in said bill that it was filed on behalf of all of them. Upon a reference to a master a distribution was made of the entire fund. Thereafterwards Mary David filed a bill in the present suit, alleging that she was the sole next of kin. The court held that she was bound by the decree in the suit brought by Ella Church, and that her only recourse was against the parties who had received the money, the administrator being fully protected by the decree. The court said:

> Upon the application of any person claiming to be interested, the court refers it to the master to inquire who are creditors and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the master, within a reasonable time stated; and when that time has expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the master, established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim. But it is obvious that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom

from that where the advertisements are published, or, from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it. It is for this reason that if a party who has not gone in before the master applies to the court after the master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of willful default in not claiming before the master, the court will refer it to the master, to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title as if he had originally claimed before the master. This is every day's practice with respect to creditors. For the same reason if a creditor does not happen to discover the proceedings in the court until after the distribution has been actually made by the order of the court amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator, who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him.

In *Gillespie* v. *Alexander* (3 Russ., 131), Lord Eldon said:

> If a creditor does not come in until after the executor has paid away the residue, he is not without remedy though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so, but he can not affect the legatees except by suit, and he can not affect the executor at all.

The same principle was adopted by Lord Lyndhurst in *Gregg* v. *Somerville* (1 Russ. & M., 338).

In *Hallett* v. *Hallett* (2 Paige's Ch., 15) a suit was brought by one of a class of legatees in behalf of all to procure a payment of the legacy. The chancellor discussed the various cases in which such a procedure was proper, and stated:

> In these cases to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit and bear their proportion of the expenses of the litigation. If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims which they might have had upon the same. But if the rights of such absent parties are known and

> ascertained by the proceedings in the suit, provision will be made for them in the decree. (Anon., 9 Price, 210.) In either case the court will protect the defendants against any further litigation in respect to the fund.

This case also approves the case of *Farrell* v. *Smith*, *supra*.

In *Campbell* v. *Railroad Co.* (Fed. Cas., 2366), it appeared that a foreclosure suit had been brought in which certain decrees had been entered. The present suit was brought by certain bondholders who were dissatisfied with those decrees, and who had not been made parties thereto. The trustee had been made a party.

The court held that although the bondholders had not been made parties to the foreclosure suit, yet they were represented by the trustee and were bound by the decree therein. The decision was placed not upon the ground that the trustee under the mortgage was the only proper and necessary party, but upon the ground that the bondholders were represented by the trustee, and any one of them could have come in at any time and been made a party to the suit. The court said:

> This I regard as the proper general rule, growing out of and being merely an application of the more general rule that where parties are exceedingly numerous, and it would be impracticable to join them all without almost interminable delays and other inconveniences which would obstruct and perhaps defeat the purposes of justice, it is not necessary that they

> should all be made parties to a suit in equity: but a suit brought by or against some, in the behalf of all, will be binding on all.

And further:

> The bondholders, if not parties to the suit, were quasi parties, and had the right at any time to intervene and become actual parties.
>
> The present suit, therefore, must be regarded as a suit brought by those who were quasi parties or privies to the former suit, and who, as such, were bound by the decrees rendered therein, unless they can show some ground for setting aside the decree which could be set up by an actual party to the suit.

In *Kerrison* v. *Stewart* (93 U. S., 155) a similar rule was laid down by the United States Supreme Court in a similar case. Mr. Chief Justice Waite said:

> In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party.
>
> The principle which underlies this rule has always been applied in proceedings relating to railway mortgages where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience.

It is evident from these cases that where a suit is brought by one of a class to establish a common right, the decree in such suit is binding on the whole class, so far as the general right is concerned, and when a distribution is made of the whole fund under such a decree, the trustee, or the person in whose hands the fund was, will be fully protected. Most of the cases have stated that this result is necessary in order that any justice may be done. It would seem, however, that the true basis on which such holdings are sustained is that the fund, being within the jurisdiction of the court, is acted upon directly and the proceeding is *in rem*. This is not pointed out in many of the cases, but it is well stated in *Hallett* v. *Hallett*, *supra*. After citing many cases in which the procedure had been applied, Chancellor Walworth said:

> In all these cases the proceedings are *in rem*. And the parties who have the exclusive control of the fund being before the court, the chancellor takes the administration thereof into his own hands, and directs due notice to be given to all parties interested to come in and exhibit their claims and settle their priorities. The court having directed the distribution of the fund and thus deprived the executor or trustee of all control over the same, it will not permit those who have neglected to come in under the decree to proceed in a suit against the executor or party from whose hands the fund has thus been taken for distribution.

The only commentary that can be made upon the case at bar to distinguish it from the principles above

laid down is that, in some of the cases cited, reference was made to a master to ascertain who were the individuals of the class indicated, and upon his report the court itself decreed a distribution, while in this case the court remitted the whole matter to the Indian Office and washed its hands of all responsibility. Whatever may be said of such a proceeding if the class of beneficiaries were an ordinary one, it remains true in this case that no instrumentality could have been devised that was more fitted to discharge correctly the task of locating these Indians than the officers of the Interior Department. A court of equity has some discretion and some latitude in carrying out its judgments.

The Court of Claims practically ordered that the distribution be made by the Indian Office. It could not have made any other order. This court affirmed that order, specifically stating that the circumstances of the case required it. Congress recognized the propriety of the action in appropriating $1,000 to pay the expenses of such distribution, and who can say that any instrumentality more effective than this could have been devised? An auditor from the Court of Claims would have made poor work of determining who these Indians were.

It should be held that the United States adopted the most feasible plan of distribution and that it should not suffer for having complied with a decree of the Supreme Court. It certainly acted in good faith in the matter, and it certainly has once paid all that it owed.

In all the Indian cases that have come before this court none have been found in which the court has undertaken to distribute a fund to individual Indians by its own directions. It has always been done through the Indian Office; and there seems to be a well-recognized procedure to that effect in such cases. Even if the court had ordered that the findings of the Indian Office be reported to it for confirmation, it does not appear that these claimants would have been benefited thereby. None of them presented their claims to the Indian agents, and the list of Indians as made by the Indian officers would undoubtedly have been approved by this court if it had been reported to it.

These Indians were represented by counsel, who made a protest against the first scheme of distribution, which protest was upheld, and the ideas of the counsel for these claimants were carried out as well as they could be by the Indian officers, and it can not be said that these claimants are without fault in standing by and seeing the money distributed. They did know, or at least should have known, what was going on, and then was the time to establish their claims.

In many of the Indian cases that have come before the Court of Claims where it was necessary to distribute a fund to individual Indians, that court has directed the fund to be distributed practically in the same way that this fund was distributed.

Western Cherokees v. *United States*, 27 C. Cls. R., 61.

Journeycake v. *United States*, 28 C. Cls. R., 319.

Whitmore v. *Cherokee Nation*, 30 C. Cls. R., 177.

These cases are referred to in the opinion of the court below.

THESE CLAIMANTS ARE ESTOPPED FROM CLAIMING A SHARE IN THIS FUND.

The ground on which this case was disposed of by the court below seems to be perfectly tenable. It is in effect that these claimants, being represented by counsel, and being parties to the former litigation and knowing that the fund was about to be distributed under an enumeration of the individual Indians which had been made for that purpose, were bound to see to it that their names appeared on the list, and not having done so, but having allowed the United States to distribute the whole fund upon a list which did not include their names, they are now estopped from asking a repayment.

The language of the court below seems to state this position forcibly. It is as follows:

> The authorities cited by the counsel may be resolved into two general classes: One where an officer, such as an administrator or executor, pays away a fund under the coercion of a decree or order of a court having jurisdiction of the fund; the other, where an innocent stakeholder, without fault, negligence, or mistake, pays away a fund to the injury of a negligent party who fails to present his claim in due time. Apart from these authorities there is the great principle of equitable estoppel, that where a man remains silent when he ought to speak he can not be permitted to speak when it will be to the injury of another person who was misled

by his silence. In this case the claimant knew, or could have known, that the census made by an agent of the Interior Department was returned and filed in August, 1895, and that the final decision of the Secretary of the Interior was made in January, 1896. So far the case seems clear. The resulting question is, Were the claimants bound to ascertain between that time and the payment of the fund during the month of November, 1896, that their names were on the pay roll, or might they assume that the direction of the Secretary would be correctly carried out by his subordinates?

The court has reluctantly come to the conclusion that that burden rested upon the claimants. The documentary proceedings in the Interior Department were not completed when the order of the Secretary was made. His decision was his direction that a new pay roll be made, and the circumstances required vigilance on the part of persons whose right to be there had not yet been determined by name to see that their names were duly placed upon the final pay roll. It is the misfortune of these claimants that they did not do so.

The attorney for the appellant in his brief filed in this court (p. 8, etc.) takes the position that it is the duty of a debtor to seek his creditor for the purpose of payment, and that such duty is paramount and can not be evaded, citing

Beach on Contracts, §329.

Jones v. *Ricketts*, 7 Md., 108.

Startup v. *MacDonald*, 6 Man. & G., 593.

The principles announced in these authorities are

not disputed. Ordinarily a debtor is bound to find his creditor in order to discharge the debt. But in the case at bar there are other considerations.

It is a case in which the question of the amount of the debt and the individuals to whom it was due was a matter of great difficulty.

It is further a case in which a fixed sum was due to such creditors as a class, the share of each individual depending primarily upon the number of such individuals in the class. Under such circumstances it is probable that in case any individual claimants did not know, or were not bound to know, that the money was about to be distributed no equitable estoppel could arise. But these claimants did know, or should have known, what was about to occur, and if they stood by, knowing that the United States in good faith was about to place itself in a position wherein it would be damaged in case such claimants insisted on sharing in the money at a later date, and, knowing these facts, remained silent until after the United States had assumed such position, it is evident that such claimants should be held to have estopped themselves from insisting upon their rights at this date.

The facts upon which the equitable estoppel in this case should be based are as follows:

These claimants were represented in a proceeding in which a judgment was rendered and were represented before the Interior Department during the time that preparations for a distribution were being made. They knew or should have known the following facts:

That a judgment had been rendered in favor of

themselves among others; that Congress had appropriated sufficient funds to pay said judgment; that its distribution had been left to the Interior Department; that the Interior Department had taken measures to ascertain the individuals entitled to participate; that such procedure was not satisfactory to them, but they protested against it; that on January 10, 1896, the Secretary of the Interior upheld their protest and adopted the plan of enrollment insisted upon by them; that a special agent was sent to their country early in 1896 to revise the pay roll already made by Mr. Cadman, in order that it might conform to the contention made by these claimants through their attorney; that said special agent did proceed to their country and posted notices of hearings and heard all who presented claims; that on March 14, 1896, said special agent made a report which did not include the names of these claimants; that in the reasonable course of events a distribution of the whole fund would be made by the Department on the basis of said pay roll and report; that they were entitled to be on said pay rolls; that they could show this fact and that the United States was about to pay out all the money without giving them their share.

Having knowledge of these facts, they did nothing, but remained silent, and the United States did pay out all the fund in the manner indicated, relying upon the conclusion that all the parties entitled to participate had been found and enumerated.

The above statements are fully supported by the findings of fact and the record in this case, and present all the elements on which to base an equitable estoppel.

1. There was their silence in the face of a situation which would lead the United States to put itself in a position in which it would be subjected to loss in case the claimants are allowed to repudiate their conduct.

2. The facts entitling the claimants to participate were known to the claimants at that time.

3. The facts concerning their right to participate were unknown to the United States at that time.

4. The United States distributed the fund, relying upon the fact that every claimant would come forward and establish his claim.

5. As a result, the United States acted in the matter in such a manner as to change its position for the worse.

The essential elements upon which to base such an estoppel are well enumerated by Mr. Pomeroy in his work on Equity Jurisprudence (sec. 805, 2d edition), and all these elements are present in this case, with the exception of one which Mr. Pomeroy has mentioned and commented upon as follows:

> 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims a benefit of the estoppel.

It would be too much to claim that the appellants stood by and said nothing for the purpose of inducing the United States to pay out this fund erroneously, but

it is not necessary that such an element of intention or expectation should be present in order to work an estoppel. (Pomeroy's Equity Jurisprudence, 2d edition, section 805, and note 1, section 806.)

In these sections and the exhaustive note referred to it is very clearly pointed out that the element of intention or of fraud is not necessary in order to work an equitable estoppel, unless it is sought to deprive a person thereby of an interest in or title to real property, in which case there seems to be a theory that a fraudulent intent is essential in order to avoid the statute of frauds.

The cases referred to and the above discussion seem to establish the principle beyond question.

The statements in the brief for the appellants to the effect that it was impossible for the claimants or their attorney to ascertain the situation appears to be without foundation in this record.

It is stated in the brief for the appellants, pages 9 and 10, that the United States can not rely upon the estoppel for the reason that the United States was a party in the litigation in the Court of Claims and in this court, where the judgment was rendered, and knew all about the claims of these appellants. This statement is not correct. It is true that the United States knew of that litigation and that there was a certain class of Indians entitled to this fund, but it is not true that the United States knew who the individual Indians were, nor is there anything in any of those proceedings which would give the United States any light on that subject. The only point at issue there was whether or not there was a fund belonging to the class

of Indians. There was nothing disclosed in those suits which would aid the United States at all in the distribution of the fund. The fact that there was a fund and the distribution of that fund are two entirely distinct matters, and it is the conduct of the appellants in regard to the latter operation that is the foundation of this estoppel.

It is further stated that 150 of these claimants notified the Interior Department that they were entitled to participate because their ancestors appeared on the pay rolls of 1843 and 1844.

It is true that Mr. Shipman inclosed such a list to the Interior Department, but it was previous to the determination on January 10, 1896, by the Secretary that those pay rolls should be included, and it was for the purpose of inducing the Secretary to make that decision. Afterwards, when that decision was made, it does not appear that these 150 claimants pressed their claims or said anything at all about it. They maintained their silence equally with the rest of the 272 claimants. If this list of names in Mr. Shipman's letter is enough to prevent the application of the principle in regard to these 150 persons, it can have no effect on the rest of them.

For the foregoing reasons the judgment of the Court of Claims should be affirmed.

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